

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

BENJAMIN R. NEESE,)	
)	No. CV-10-00296-CI
Plaintiff,)	
)	ORDER DENYING PLAINTIFF'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	AND GRANTING DEFENDANT'S
MICHAEL J. ASTRUE, Commissioner)	MOTION FOR SUMMARY JUDGMENT
of Social Security,)	
)	
Defendant.)	

BEFORE THE COURT are cross-Motions for Summary Judgment. (ECF No. 13, 20.) Attorney David L. Lybbert represents Benjamin Neese (Plaintiff); Special Assistant United States Attorney Franco L. Becia represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (ECF No. 6.) After reviewing the administrative record and briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment, and directs entry of judgment for Defendant.

JURISDICTION

Plaintiff protectively filed for disability insurance benefits (DIB) and Supplemental Security Income (SSI) on May 3, 2007. (Tr. 128.) He alleges disability due to "bipolar/manic depression/spinal bifida/ back fusion" with an onset date of September 15, 2005. (Tr. 118.) Benefits were denied initially and on reconsideration.

1 Plaintiff timely requested a hearing before an administrative law
2 judge (ALJ), which was held before ALJ Michael Hertzog on October
3 16, 2009. (Tr. 27-41.) Plaintiff, who was represented by counsel,
4 testified. Vocational expert Daniel McKinny (VE) was present but
5 did not testify. (Tr. 27-28.) The ALJ denied benefits on November
6 3, 2009, and the Appeals Council denied review. (Tr. 1-4, 17-26.)
7 The instant matter is before this court pursuant to 42 U.S.C. §
8 405(g).

9 STANDARD OF REVIEW

10 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
11 court set out the standard of review:

12 A district court's order upholding the Commissioner's
13 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
14 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
15 Commissioner may be reversed only if it is not supported
16 by substantial evidence or if it is based on legal error.
17 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
18 Substantial evidence is defined as being more than a mere
19 scintilla, but less than a preponderance. *Id.* at 1098.
20 Put another way, substantial evidence is such relevant
21 evidence as a reasonable mind might accept as adequate to
22 support a conclusion. *Richardson v. Perales*, 402 U.S.
23 389, 401 (1971). If the evidence is susceptible to more
24 than one rational interpretation, the court may not
25 substitute its judgment for that of the Commissioner.
26 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*
27 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

28 The ALJ is responsible for determining credibility,
resolving conflicts in medical testimony, and resolving
ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
Cir. 1995). The ALJ's determinations of law are reviewed
de novo, although deference is owed to a reasonable
construction of the applicable statutes. *McNatt v. Apfel*,
201 F.3d 1084, 1087 (9th Cir. 2000).

It is the role of the trier of fact, not this court, to resolve
conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
supports more than one rational interpretation, the court may not

1 substitute its judgment for that of the Commissioner. *Tackett*, 180
2 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
3 Nevertheless, a decision supported by substantial evidence will
4 still be set aside if the proper legal standards were not applied in
5 weighing the evidence and making the decision. *Browner v. Secretary*
6 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
7 there is substantial evidence to support the administrative
8 findings, or if there is conflicting evidence that will support a
9 finding of either disability or non-disability, the finding of the
10 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
11 1230 (9th Cir. 1987).

12 SEQUENTIAL EVALUATION

13 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
14 requirements necessary to establish disability:

15 Under the Social Security Act, individuals who are
16 "under a disability" are eligible to receive benefits. 42
17 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
18 medically determinable physical or mental impairment"
19 which prevents one from engaging "in any substantial
20 gainful activity" and is expected to result in death or
21 last "for a continuous period of not less than 12 months."
22 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
23 from "anatomical, physiological, or psychological
24 abnormalities which are demonstrable by medically
25 acceptable clinical and laboratory diagnostic techniques."
26 42 U.S.C. § 423(d)(3). The Act also provides that a
27 claimant will be eligible for benefits only if his
28 impairments "are of such severity that he is not only
unable to do his previous work but cannot, considering his
age, education and work experience, engage in any other
kind of substantial gainful work which exists in the
national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,
the definition of disability consists of both medical and
vocational components.

In evaluating whether a claimant suffers from a
disability, an ALJ must apply a five-step sequential
inquiry addressing both components of the definition,
until a question is answered affirmatively or negatively
in such a way that an ultimate determination can be made.

1 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
2 claimant bears the burden of proving that [s]he is
3 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
4 1999). This requires the presentation of "complete and
detailed objective medical reports of h[is] condition from
licensed medical professionals." *Id.* (citing 20 C.F.R. §§
404.1512(a)-(b), 404.1513(d)).

5 The Commissioner has established a five-step sequential
6 evaluation process for determining whether a person is disabled. 20
7 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
8 137, 140-42 (1987). In steps one through four, the burden of proof
9 rests upon the claimant to establish a prima facie case of
10 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d
11 920, 921 (9th Cir. 1971). This burden is met once a claimant
12 establishes that a physical or mental impairment prevents her from
13 engaging in her previous occupation. 20 C.F.R. §§ 404.1520(a),
14 416.920(a). If a claimant cannot do past relevant work, the ALJ
15 proceeds to step five, and the burden shifts to the Commissioner to
16 show that (1) the claimant can make an adjustment to other work; and
17 (2) specific jobs exist in the national economy which claimant can
18 perform. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v.*
19 *Heckler*, 722 F.2d 1496, 1497-98 (9th Cir. 1984).

20 STATEMENT OF THE CASE

21 The facts of the case are set forth in detail in the transcript
22 of proceedings and are briefly summarized here. In June 2004, ALJ
23 R.J. Payne found Plaintiff disabled under Listing 1.04A for a closed
24 period ending on October 7, 2003. (Tr. 29, 48.) Plaintiff
25 reapplied for benefits in May 2007, which were denied initially and
26 on reconsideration. Plaintiff requested a hearing, which was held
27 in October 2009 before ALJ Hertzog.

1 At the time of the hearing, Plaintiff was 31 years old,
2 unmarried, and living with his parents. (Tr. 32.) He stated he has
3 a daughter who does not live with him. (Tr. 33-34.) He reported a
4 ninth grade education and past work as a construction laborer, with
5 his last job ending in July 2006. (Tr. 32, 118-19, 123.) Plaintiff
6 testified he had a brief incarceration in 2005 for a drug-related
7 conviction. (Tr. 32, 34-35.) His representative stated Plaintiff
8 could no longer do regular work due to disabling mental health
9 problems. (Tr. 30.)

10 ADMINISTRATIVE DECISION

11 ALJ Hertzog found prior concurrent claims filed in November
12 2005, which were denied in February 2006, were not timely appealed.
13 He found no reason was presented that warranted reopening the
14 February 2006 determinations.¹ (Tr. 17.) He specifically noted that
15 evidence existing at the time of the February 2006 decision was
16 considered in this case "strictly for the purpose of establishing
17 medical history." (*Id.*) The ALJ then found Plaintiff met insured
18 status requirements for DIB through March 31, 2008. (Tr. 25.) At
19 step one of the sequential evaluation process, he found Plaintiff
20 had not engaged in substantial gainful activity since the alleged
21 onset date of September 15, 2005. (*Id.*) He found Plaintiff had
22 severe impairments of "status post 2003 lumbar fusion with more
23 recent MRI evidence of minor degenerative changes, depressive
24 disorder, anxiety, and a history of substance abuse." (*Id.*) He

25 ¹ As a general rule, the Commissioner's explicit refusal to
26 reopen a prior application is not subject to judicial review.
27 *Lester v. Chater*, 81 F.3d 821, 827 (9th Cir. 1995).
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1 also found medical impressions of auditory dyslexia, bipolar
2 disorder, intermittent explosive disorder, panic attacks, borderline
3 personality, and leg fractures were unsupported by medical evidence
4 and/or of insufficient duration to qualify as a severe impairment.
5 (Tr. 22.) At step three, he found medically established
6 impairments, alone and in combination, did not meet or medically
7 equal one of the listed impairments in 20 C.F.R., Appendix 1,
8 Subpart P, Regulations No. 4 (Listings). (Tr. 25.) At step four,
9 the ALJ determined Plaintiff had the residual functional capacity
10 (RFC) to perform light work, "of an unskilled nature which involved
11 simple 1 to 2 step tasks." (*Id.*)

12 In his step four findings, ALJ summarized Plaintiff's
13 testimony, made credibility findings, and concluded Plaintiff's
14 allegations lacked credibility. (Tr. 23-24.) He concluded
15 Plaintiff could not perform his past relevant work, but his
16 limitation to light unskilled work did not erode significantly the
17 occupational base available to Plaintiff. (Tr. 26.) Applying the
18 Medical-Vocational Guidelines (Grids), the ALJ concluded Plaintiff
19 could perform other work in the national economy and was not
20 "disabled" as defined by the Social Security Act. (*Id.*)

21 ISSUES

22 The question is whether the ALJ's decision is supported by
23 substantial evidence and free of legal error. Plaintiff argues the
24 ALJ erred when he: (1) improperly rejected examining and non-
25 examining medical source opinions; (2) erroneously denied
26 Plaintiff's request for a continuance; (3) failed to assist
27 Plaintiff by requesting more recent treatment records and ordering
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1 a consultative physical exam; (4) improperly assessed his RFC; and
2 (5) erroneously relied on the Grids at step five. (ECF No. 14.)

3 **A. Credibility**

4 In his Reply, Plaintiff appears to challenge the ALJ's
5 credibility findings, but fails to specify which findings were not
6 valid and unsupported by the record. (ECF No. 22 at 8.) Generally,
7 the court will not address issues that are inadequately briefed.
8 *Carmickle v. Comm of Soc Sec*, 533 F.3d 1155, 1161 n.2 (2008)(citing
9 *Paladin Assoc. v. Montana Power Co.* 328 F.3d 1145, 1164 (9th Cir.
10 2003)). Nonetheless, *de novo* review indicates the ALJ's credibility
11 findings are "clear and convincing" and supported amply by
12 substantial evidence. *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th
13 Cir. 2008); *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir.
14 2007); *Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005); *Light v.*
15 *Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

16 Although credibility determinations are the sole province of
17 the ALJ, when the adjudicator finds a claimant's statements
18 regarding the severity of impairments and limitations are not
19 credible, he must make a credibility determination with findings
20 sufficiently specific to permit the court to conclude the ALJ did
21 not arbitrarily discredit claimant's allegations. *Richardson*, 402
22 U.S. at 400; *Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th Cir.
23 2002); *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9th Cir. 1991) (en
24 banc); *Fair v. Bowen*, 885 F.2d 597, 604 (9th Cir. 1989). When
25 assessing a claimant's credibility, the lack of objective medical
26 evidence is a proper factor to consider along with: a claimant's
27 treatment history; daily activities; effectiveness of medication;

1 work record; a claimant's reputation for truthfulness;
2 inconsistencies in his testimony, or between his testimony and
3 conduct; and observations of physicians and third parties with
4 personal knowledge of the claimant's symptoms. *Tommasetti*, 533 F.3d
5 at 1039; *Burch*, 400 F.3d at 680; SSR 96-7p. Here, after summarizing
6 Plaintiff's hearing testimony, the ALJ specifically found
7 Plaintiff's allegations regarding limitations caused by his
8 impairments lacked credibility. (Tr. 23.)

9 In support of this finding, the ALJ found the medical evidence
10 indicates Plaintiff's treatment and medication relieved and/or
11 controlled his pain and symptoms, that there was no medical evidence
12 to show Plaintiff's knee fracture in 2007 caused significant
13 functional limitations that lasted more than twelve months, and that
14 medical opinions from the examining orthopedist and examining
15 psychologist in 2008 did not indicate disabling dysfunction from
16 back or mental health impairments. The ALJ also referenced specific
17 examples of Plaintiff's lack of candor about his drug use history,
18 including repeated (and unexplained) urinalysis results positive for
19 cocaine and the examining psychologist's observation of inconsistent
20 report of drug use. (*Id.*; Tr. 333, 342, 442, 444.) Lack of candor
21 about illegal drug use is sufficient to reject a claimant's
22 testimony. *Verduzco v. Apfel*, 188 F.3d 1087, 1090 (9th Cir. 1999).
23 In addition, the ALJ referenced Plaintiff's reported daily
24 activities in support of the adverse credibility findings. As found
25 by the ALJ, Plaintiff reported doing house work and yard work,
26 walking for exercise, shopping, and an ability to pay bills, manage
27 money, drive and use public transportation. (Tr. 23-24, 442.)

1 These reported daily activities are not consistent with Plaintiff's
2 allegations of a total inability to work and, therefore, support an
3 adverse credibility determination. *Tommasetti*, 533 F.3d at 1039;
4 *Burch*, 400 F.3d at 680.

5 Where substantial evidence supports the ALJ's credibility
6 determination, the court may not second-guess the Commissioner's
7 interpretation even "where the evidence is susceptible to more than
8 one rational interpretation." *Magallanes*, 881 F.2d 747, 750 (9th
9 Cir. 1989); see also *Morgan*, 169 F.3d at 599 (credibility
10 determination is function solely of the Commissioner). The ALJ did
11 not err in finding Plaintiff lacked credibility.

12 **B. Step Two Findings - Severe Impairments**

13 Plaintiff asserts the ALJ "did not include nor consider as
14 severe impairments, the claimant's history of a learning disorder,
15 borderline IQ, ADHD, or auditory dyslexia, which are diagnosed and
16 considered by several types of specialists." (ECF No. 14 at 17.)
17 Plaintiff's argument is not supported by the ALJ's decision or by
18 objective medical evidence, as required by the Regulations.

19 At step two of the sequential evaluation, the ALJ determines
20 whether a claimant suffers from a "severe" impairment, *i.e.*, one
21 that significantly limits his physical or mental ability to do basic
22 work activities. 20 C.F.R. §§ 404.1520(c), 416.920(c). To satisfy
23 step two's requirement of a severe impairment, the claimant must
24 prove the existence of a physical or mental impairment by providing
25 medical evidence consisting of signs, symptoms, and laboratory
26 findings. The fact that a medically determinable condition exists
27 does not automatically mean the symptoms are "severe," or
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1 "disabling" as defined by the Social Security regulations. See,
2 *e.g.*, *Edlund*, 253 F.3d at 1157-58; *Fair*, 885 F.2d at 603; *Key v.*
3 *Heckler*, 754 F.2d 1545, 1549-50 (9th Cir. 1985).

4 Here, the ALJ specifically addressed the conditions identified
5 by Plaintiff in his briefing. (Tr. 22.) The ALJ reasonably
6 determined objective medical evidence did not establish the
7 referenced conditions as severe impairments. For example, the ALJ
8 found the documented impression of auditory dyslexia was based on
9 Plaintiff's subjective complaint, and no objective medical evidence
10 was submitted to establish this diagnosis. (Tr. 22.) Plaintiff's
11 statements to providers are insufficient to establish a severe
12 impairment. 20 C.F.R. §§ 404.1508, 416.908. Further, as noted by
13 the ALJ, examining psychologist Thomas Genthe, Ph.D., observed that
14 Plaintiff had no problem following a conversation during his exam.
15 (Tr. 22, 442.) The ALJ also discussed impressions of bipolar
16 disorder, panic attacks, and intermittent explosive disorder that
17 were found in the record, and found these impressions were not
18 corroborated by treatment evidence, examining medical source
19 opinions, or clinical observations. (Tr. 22.)

20 Regarding allegations of a learning disorder, borderline
21 functioning, and ADHD, Plaintiff's conclusory assumption that these
22 conditions exist, based on an unsupported observation by Dr. Goodwin
23 in 2005 and 2006 when Plaintiff was actively using drugs, is
24 insufficient to meet his step two burden. (ECF 14 at 17.) As found
25 by the ALJ, nurse practitioner reports covering four years of
26 treatment do not include clinical observations of these conditions,
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1 and the acceptable medical sources did not include these diagnoses
2 in their diagnostic impressions. (Tr. 22.) Further, even assuming
3 these conditions could be established, Plaintiff's reported daily
4 activities, ability to manage his finances, and overall normal
5 mental status assessed by the examining psychologist (Tr. 442), do
6 not reflect cognitive functioning that would significantly impact
7 Plaintiff's ability to perform unskilled work. *Edlund*, 253 F.3d at
8 1159-60. Plaintiff's assertion that the ALJ did not consider non-
9 severe impairments fails. The ALJ properly addressed the evidence
10 of these conditions and gave legally sufficient reasons for finding
11 them non-severe.

12 **C. Evaluation of Medical Evidence**

13 After briefly presenting his interpretation of the evidence,
14 Plaintiff makes the general assertion that the ALJ failed to apply
15 proper legal standards in his decision. (ECF No. 14 at 8-10.)
16 Plaintiff argues the ALJ improperly rejected or failed to address
17 findings of examining psychologists James Goodwin, Ph.D., and Thomas
18 Genthe, Ph.D., examining physician Gaffield, D.O., and reviewing
19 psychologist Mary Gentile, Ph.D. (ECF No. 14 at 14, 17, 20.)
20 However, *de novo* review of the record in its entirety indicates the
21 ALJ's evaluation of the medical records reflects a reasonable
22 interpretation of the evidence in its entirety that is supported by
23 substantial evidence.

24 **1. Acceptable Medical Sources**

25 **a. Dr. Goodwin, Ph.D.**

26 As an examining psychologist, Dr. Goodwin's opinions must be
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1 considered and can be rejected only with "clear and convincing"
2 reasons. If medical findings are contradicted by other medical
3 source opinions, the ALJ's reasons for rejection must be "specific"
4 and "legitimate." *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
5 1995); *Andrews*, 53 F.3d at 1043. The record shows Dr. Goodwin
6 examined Plaintiff in September 2005 and in April and October 2006.
7 Dr. Goodwin consistently diagnosed major depressive disorder,
8 recurrent moderate, and polysubstance abuse in remission. These
9 diagnoses are reflected in the ALJ's step two findings. (Tr. 20,
10 25, 193, 204, 216.) In his evaluation summaries, Dr. Goodwin opined
11 Plaintiff had "marked" limitations in the social functioning
12 criteria. The ALJ specifically rejected the marked rating because
13 (1) the severity of the assessed limitation was inconsistent with
14 the multiple diagnoses of moderate depressive disorder; (2) Dr.
15 Goodwin did not have access to records from other providers during
16 the same period that documented Plaintiff's ongoing substance abuse
17 and noncompliance with prescribed medication; and (3) the evidence
18 does not establish the duration requirement for an impairment of
19 that severity.² (Tr. 23.) These are "clear and convincing" reasons
20 to reject an examining medical source opinion. Further, these
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23 ² A disabling impairment must last or be expected to last for
24 a continuous period of 12 months. 20 C.F.R. §§ 404.1505, 416.905.
25 The record should document all pertinent symptoms, signs and
26 laboratory findings, as well as prescribed treatment, and the
27 response to treatment in terms of changes in symptoms. SSR 82-52
28 (Documentation).

1 reasons are supported by substantial evidence and reflect a rational
2 interpretation of the record in its entirety. *Vasquez v. Astrue*,
3 572 F.3d 586, 591 (9th Cir. 2009).

4 For example, as noted by the ALJ, in March 2006, Plaintiff
5 reported depression and anxiety to treating nurse practitioner Holly
6 Williams. However, at that time, he was not on medication. (Tr.
7 20, 350, 355.) By May 2006, Ms. Williams noted he was stable on
8 depression medication, and his complaints of anxiety stopped when he
9 was compliant with prescribed daily medication. (Tr. 345.) Due to
10 problems with non-compliance, Plaintiff was required to sign a pain
11 medication contract in July 2006. (Tr. 342.) In October 2006, Ms.
12 Williams noted Plaintiff's unexplained urinalysis results positive
13 for cocaine and negative for his prescribed medication. (Tr. 333,
14 342.) Plaintiff's unexplained positive drug testing was discussed
15 repeatedly in clinic notes through January 2007. (Tr. 330-37.) The
16 record also shows that in early 2007, Plaintiff was incarcerated for
17 cocaine-related charges. (Tr. 327.) The ALJ reasonably concluded
18 mental limitations assessed during this time were affected by
19 Plaintiff's failure to take prescribed medication and use of illicit
20 drugs. The ALJ did not err in giving little weight to the
21 limitations assessed by Dr. Goodwin.³

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24 ³ Although Plaintiff argues that, according to Dr. Goodwin, he
25 had "zero math skills and severe impairments in reading and
26 understanding," (ECF No. 14 at 17), Plaintiff reported to Dr. Genthe
27 in 2008 that he was capable of counting money, making deposits and
28 withdrawals at the bank, paying his bills, making purchases, and

1 **b. Dr. Gaffield, D.O.**

2 Dr. Gaffield examined Plaintiff at the agency's request in
3 February 2008. (Tr. 21, 424.) In his functional assessment, he
4 noted Plaintiff had a surgical repair of a fracture of the left knee
5 in 2007, and had just completed physical therapy. (Tr. 425.) Dr.
6 Gaffield opined Plaintiff was capable of sitting eight hours in an
7 eight hour day, but specifically noted that "in view of the recent
8 fracture involving the left lower extremity and the fact that he is
9 currently under orthopedic care," he did not expect Plaintiff to
10 walk or stand more than two hours during the eight hour day. (Tr.
11 429.) Plaintiff argues the ALJ erred in finding the limitation to
12 two hours standing/walking did not persist beyond 12 months after
13 the injury. (ECF No. 14 at 15; Tr. 22.) Plaintiff also contends
14 "the Social Security Administration must assume [his
15 standing/walking restrictions] are permanent." This contention is
16 unsupported by the record and misconstrues the legal standards
17 applicable to these proceedings.

18 As noted above, it is the claimant's burden to present medical
19 evidence of an impairment, and it is solely the responsibility of
20 the ALJ to evaluate the medical evidence and resolve ambiguities
21 and/or conflicts. *Andrews*, 53 F.3d at 1039. Where substantial
22 evidence supports the ALJ's interpretation of the medical evidence,
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24 _____
25 writing checks. (Tr. 445.) In addition, contemporaneous treatment
26 notes from Holly Williams, ARNP, do not reflect significant
27 cognitive deficits or an inability to understand and cooperate in
28 medical care or function on a daily basis. (Tr. 345-55.)

1 the court will not second-guess his conclusions and findings.
2 *Tackett*, 180 F.3d at 1097. ALJ Hertzog met his burden when he
3 thoroughly summarized Dr. Gaffield's findings and conclusions and
4 made his RFC findings. *Magallanes*, 881 F.2d 751; (Tr. 21, 24, 429).
5 Further, the ALJ properly discounted Dr. Gaffield's assessed
6 limitation of no more than two hours standing due to a recent knee
7 injury, explaining that the standing/walking limitation was assessed
8 shortly after Plaintiff's knee fracture and surgery in late 2007.
9 (Tr. 24.) His finding that the medical evidence did not indicate
10 ongoing "left leg pain, weakness and limitation of motion," (*id.*),
11 is a "clear and convincing" reason to discount the standing
12 limitation of two hours. 20 C.F.R. §§ 404.1509, 416.909
13 (impairments must be expected to last continuously for at least 12
14 months). Plaintiff's speculation that his fracture "may" have
15 lasted more than 12 months, is insufficient to meet his burden of
16 proof. Without supporting medical evidence to establish duration,
17 Plaintiff's argument fails.

18 The ALJ also reasoned Plaintiff's reported activities of daily
19 living throughout the record do not reflect the degree of limitation
20 experienced during his recovery from knee surgery. (Tr. 24, 360,
21 398-99.) This is a clear and convincing reason to discount a
22 medical opinion. *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir.
23 2001). Finally, as discussed below, the ALJ found Plaintiff capable
24 of performing a full range of light work, which includes a full
25 range of sedentary work. 20 C.F.R. §§ 404.1567(b), 416.967(b).
26 "Jobs are sedentary if walking and standing are required
27 occasionally and other sedentary criteria are met." 20 C.F.R. §§
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1 404.1567(a), 416.967(a). "Occasional" means very little, up to one
2 third of the time (about two hours of an eight hour work day). SSR
3 83-10. Because sedentary work requires only two hours of walking
4 and standing, even if Plaintiff's unsupported assertion were
5 credited, it would not change the outcome of these proceedings. The
6 ALJ's evaluation of and weight given to Dr. Gaffield's report is
7 supported by substantial evidence and without error.

8 **c. Dr. Gentile, Ph.D.**

9 In March 2008, following Dr. Genthe's examination, Mary A.
10 Gentile, Ph.D., reviewed the medical evidence and completed a
11 Psychiatric Review Technique and a RFC assessment in which she noted
12 recent findings by Dr. Genthe that Plaintiff's behavior and
13 interaction at the evaluation were inconsistent with his self-
14 reported deficits. (Tr. 449-65, 461.) Based on her review, Dr.
15 Gentile assessed moderate limitations the categories of attention
16 and concentration, social interaction and adaptation and concluded
17 Plaintiff was capable of "simple and well-learned complex tasks."
18 (Tr. 463-65.) In her narrative summary of the review, she noted
19 Plaintiff "may have episodic lapses" in attention and concentration
20 due to pain and psychological symptoms, and would do best away from
21 the general public and co-worker interaction, and in a routine
22 environment due to personality issues." (Tr. 465.) Plaintiff argues
23 the ALJ failed to include the moderate limitations assessed by Dr.
24 Gentile. (ECF No. 14 at 14.) This argument is without merit.

25 The opinion of a non-examining psychologist such as Dr. Gentile
26 cannot constitute substantial evidence unless it is supported by
27 other medical evidence. As acknowledged by Plaintiff, a non-
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1 examining medical source opinion, by itself, cannot justify the
2 rejection of an examining source opinion. ECF No. 14 at 13 (citing
3 *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990); see also
4 *Lester*, 81 F.3d at 830 (opinion of examining physician is entitled
5 to greater weight than non-examining opinion). Further, a
6 claimant's RFC is an administrative finding based on the entire
7 record: no special significance is given a single medical source
8 opinion. 20 C.F.R. §§ 404.1527(e), .1546; 416.927(e), .946; SSR 96-
9 5p.

10 Here, the ALJ discussed Dr. Gentile's review of the evidence,
11 noting it was generally consistent with his final RFC determination.
12 (Tr. 24.) However, he specifically rejected Dr. Gentile's opinions
13 regarding limited contact with the general public and co-workers
14 because the evidence did not support these restrictions or a
15 diagnosis of bipolar disorder. (Tr. 24.) The ALJ found reports
16 from treating physician Eric Olson, M.D., and examining psychologist
17 Genthe did not identify a basis for a significant personality
18 disorder. These examining medical source findings are sufficient to
19 reject a non-examining medical opinion.

20 Other evidence supports rejection of these functional
21 limitations. As noted by the ALJ, on September 8, 2005, Plaintiff
22 was assessed with depression, anxiety, cannabis dependence, and
23 borderline personality by Julie Rickard, Ph.D., at Columbia Valley
24 Community Health Services (CVCH). (Tr. 19, 22, 358.) However, this
25 assessment was based on Plaintiff's statements at a time when he
26 also reported chronic cannabis abuse. (Tr. 357-58.) In April 2006,
27 Dr. Goodwin found Plaintiff generally cooperative and appropriate
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1 with an unimpaired level of consciousness. (Tr. 203). Dr. Goodwin
2 found no indication of current antisocial behavior and diagnosed a
3 major depressive disorder (moderate) and alcohol abuse in remission
4 for 18 months. (Tr. 204.) In May 2006, ARNP Holly Williams at CVCH
5 reported the borderline personality condition was stable and
6 Plaintiff was starting a job. (Tr. 345.) Therefore, the ALJ could
7 reasonably infer from this evidence that the impression of
8 borderline personality was unsupported by clinical observations and
9 not reflected in mental health evaluations. (Tr. 22.) *Tommasetti*,
10 533 F.3d at 1040 (ALJ entitled to draw inferences flowing from the
11 evidence). Plaintiff does not address these findings by the ALJ and
12 does not cite to medical source evidence in the record that would
13 arguably support Dr. Gentile's assessment of limitations due to a
14 personality disorder. The ALJ's omission of personality disorder
15 related symptoms is a rational interpretation of the entire record.

16 As for Dr. Gentile's summary conclusion of moderate limitations
17 in Plaintiff's "ability to maintain attention and concentration for
18 extended periods," she elaborated on her conclusions in Section III
19 of the RFC assessment, stating specifically that Plaintiff was
20 "capable of simple and well-learned complex tasks." (Tr. 465.)
21 Although Dr. Gentile's comment that Plaintiff "may have lapses" in
22 attention and concentration due to subjective symptom allegations is
23 speculative, her narrative findings are consistent with the ALJ's
24 determination that Plaintiff was limited to unskilled work
25 "involving simple 1 to 2 step tasks." (Tr. 24.) Viewing the
26 evidence in its entirety, including Plaintiff's lack of candor about
27 his drug use and other problems with credibility (see Tr. 461),
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1 ALJ's RFC determination reflects a reasonable interpretation of Dr.
2 Gentile's conclusions and narrative elaboration, along with
3 examining medical source observations and conclusions, clinic notes,
4 and Plaintiff's self-reported daily activities. The ALJ did not err
5 in the weight given Dr. Gentile's non-examining opinions.

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7 **2. Other Medical Sources - Holly Williams, ARNP; Caitilin
Newman, MS NCC (Nationally Certified Counselor)**

8 Referencing observations by Ms. Williams during routine follow-
9 up exams at CVCH in 2006 and 2007, Plaintiff argues the ALJ "failed
10 to recognize the severe impairments" of "thoracic muscle spasm and
11 lumbar muscle spasm." (ECF No. 14 at 18.) Plaintiff also references
12 an assessment form in which Ms. Newman noted two marked limitations
13 in Plaintiff's social functioning, and five marked "functional
14 mental disorders." (ECF No. 14 at 11; Tr. 266-69.) Plaintiff
15 argues this report was rejected erroneously by ALJ and supports a
16 finding of "disabled." (*Id.*)

17 Ms. Newman and Ms. Williams are "other sources" under the
18 Regulations. 20 C.F.R. §§ 404.1513(d)(1), 416.913(d)(1). Neither
19 is an acceptable medical source and qualified to diagnose an
20 impairment. 20 C.F.R. §§ 404.1513(a), (d)(4), 416.913(a), (d)(4); *SSR*
21 *06-03p*. However, their opinions regarding how Plaintiff's
22 impairments affect his ability to work must be considered and may be
23 rejected only with specific, "germane" reasons. *Lewis v. Apfel*, 236
24 F.3d 503, 511 (9th Cir. 2001); *Nguyen v. Chater*, 100 F.3d 1462, 1467
25 (9th Cir. 1996).

26 The records from CVCH in their entirety show that at the same
27 time Ms. Williams observed muscle spasms, she found no sensory loss,
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1 no motor weakness, and intact balance and gait. (Tr. 348.) By May
2 2006, she noted Plaintiff was stable and doing well. (Tr. 353-54,
3 356.) In September 2006, Ms. Williams found Plaintiff was stable,
4 exhibited normal mobility and curvature of the spine, no tenderness
5 of the thoracic spine, and muscle spasms around the lumber spine.
6 (Tr. 340.) The ALJ appropriately recognized medical evidence of
7 muscle spasms in his summary of the medical evidence, considered Ms.
8 Williams observations with the rest of the evidence, and
9 incorporated her observations into his step four findings that
10 Plaintiff was limited to lifting 20 pounds occasionally. (Tr. 19-
11 24.) Further, as noted by the ALJ, on exam, Dr. Gaffield noted
12 lumbar spasms and concluded Plaintiff could perform light work.
13 (Tr. 21-22, 426, 428, 429.) The ALJ discussed and adopted Dr.
14 Gaffield's assessment with respect to Plaintiff's back condition and
15 ability to lift and carry. (Tr. 24.) Plaintiff's argument that
16 muscle spasms observed by Ms. Williams and Dr. Gaffield were
17 disregarded by the ALJ is unsupported by the record.

18 The evaluation form completed by Ms. Newman is dated May 17,
19 2007, and is not accompanied by treatment notes or a narrative
20 report. (Tr. 266-69.) As a general rule, an ALJ is only required to
21 explain why significant probative evidence is rejected. *Vincent v.*
22 *Heckler*, 739 F.2d 1393, 1394-95 (9th Cir. 1984). Here, ALJ Hertzog
23 was not obliged to accept Ms. Newman's findings because they are
24 brief, conclusory, unsupported by clinic notes or her personal
25 observations, and unexplained by a narrative report. *Thomas*, 278
26 F.3d at 957 (brief, conclusory medical source opinion not
27 probative). Plaintiff does not cite to evidence that supports Ms.
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1 Newman's findings, other than his own subjective complaints which
2 were properly rejected as not credible by the ALJ.

3 Nonetheless, the ALJ addressed the assessment forms from Ms.
4 Newman and Ms. Williams, and gave them no weight because the
5 providers are not acceptable medical sources. (Tr. 25, 266-73.)
6 The fact that an "other source" is not an acceptable medical source
7 (e.g., a licensed physician or psychologist) is a valid reason for
8 disregarding diagnoses contained in these forms. SSR 06-03p.
9 ("Other sources' cannot establish the existence of a medically
10 determinable impairment.") Although the ALJ's reason is not a valid
11 reason for rejecting functional limitations included in these forms,
12 the error is harmless. Both assessment forms are conclusory and
13 unsupported by acceptable medical source evidence.⁴ Because these
14 "other source" form reports are not probative, remand to correct any
15 error would not change the outcome of these proceedings. Therefore,
16 the error does not require remand. *Stout v. Commissioner, Social*
17 *Sec. Admin.*, 454 F.3d 1050, 1056 (9th Cir. 2006).

18 **D. Duty to Develop Record**

19 Plaintiff argues the ALJ erred when he refused to comply with
20 Plaintiff's request for assistance in providing records. He
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22 ⁴ It is noted on review that Ms. Williams assessment is
23 unsupported by her clinic notes, and is internally inconsistent.
24 Specifically, she confirms an indication of DAA, (Tr. 271), but does
25 not recommend treatment in spite of clinic notes that document
26 Plaintiff's positive test for cocaine. Significantly, she renders
27 no opinion regarding Plaintiff's ability to work. (Tr. 273.)
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1 characterizes the ALJ's actions as a failure to develop the record.
2 (ECF No. 14.at 14-15.) However, an ALJ's duty to develop the record
3 further is triggered "only when there is ambiguous evidence or when
4 the record is inadequate for proper evaluation of evidence." *Mayes*
5 *v. Massanari*, 276 F.3d 453, 4509-60 (9th Cir. 2001)(citing
6 *Tonapetyan*, 242 F.3d at 1150). Plaintiff fails to show the evidence
7 before the ALJ was ambiguous or inadequate to assess the record
8 submitted by Plaintiff.

9 In disability proceedings, the initial burden of proof is on
10 the claimant to provide medical evidence of an impairment. Objective
11 evidence consisting of signs, symptoms, and laboratory findings is
12 required; the claimant's own statement of symptoms alone will not
13 suffice. 20 C.F.R. §§ 404.1508, 416.908. Once medical evidence is
14 provided by the claimant, the Regulations state the agency "will
15 develop your complete medical history for at least the 12 months
16 preceding the month in which you file your application unless there
17 is a reason to believe that development of an earlier period is
18 necessary." 20 C.F.R. §§ 404.1512 (d), 416.912 (d).

19 As directed by the Regulations, additional consultative exams
20 are purchased after consideration of the existing medical record and
21 a claimant's allegations contained in the disability interview.
22 Only if there is a determination that the information is ambiguous
23 or inadequate to support a decision (*i.e.*, includes no clinical
24 findings, laboratory tests, or diagnoses) is additional evidence
25 required. The ALJ is required to seek additional evidence only if
26 the evidence already present consistently favors the claimant.
27 *Lewis v. Apfel*, 236 F.3d 503, 514-15 (9th Cir. 2001). There is no
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1 affirmative duty to order additional examinations. 20 C.F.R. §§
2 404.1519a, 416.919a; see also *Diaz v. Secretary of Health and Human*
3 *Services*, 898 F.2d 774, 778 (10th Cir. 1990)(Commissioner has broad
4 discretion in ordering consultative exams).

5 Here, the record shows the Social Security Administration (SSA)
6 met its burden upon receipt of medical records up to and including
7 October 2007, by ordering additional evidence in the form of a
8 consultative physical exam, dated February 16, 2008, and a
9 consultative psychological examination. (Tr. 423-30, 441-47.) In
10 its request for evaluation, the agency specifically identified the
11 alleged impairments to be considered: "bipolar/manic
12 depression/spinal bifida/back fusion;" "gait & station, ability to
13 use hands for grasping & manipulating, fine & dexterous movement;
14 ability to perform work related activities." (Tr. 423.) As discussed
15 above, the ALJ thoroughly evaluated the consultative examinations
16 and reasonably found they supported his finding that Plaintiff was
17 capable, at most, of light unskilled work. Plaintiff identifies no
18 ambiguous information in the consultative reports that would
19 reasonably require ordering additional evaluations.

20 Regarding Plaintiff's argument that remand is necessary to
21 obtain records he claims existed at the time of the hearing,
22 Plaintiff fails to show good cause for his failure to submit
23 additional records after the hearing. On July 25, 2009, the SSA
24 sent a compact disc of the existing record to Plaintiff's counsel,
25 who was directed specifically to submit any additional records to
26 support Plaintiff's application prior to the hearing. (Tr. 168-69.)
27 As noted by the ALJ, Plaintiff and his representative were notified
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1 of the October 2009 hearing on September 1, 2009. (Tr. 82-86.) In
2 that notice, Plaintiff was advised again that he could submit
3 additional evidence, and that it was "very important that the
4 evidence in your file is complete and up-to-date." (Tr. 83.) At
5 the hearing, neither Plaintiff nor his representative indicated new,
6 probative records existed. The ALJ reasonably found good cause did
7 not exist to continue the hearing. Further, Plaintiff has failed to
8 show prejudice resulted due to the denial of a continuance.

9 Plaintiff and his representative were given the opportunity to
10 submit evidence to the Appeals Council in his request for review of
11 the ALJ's decision, evidence that would have been part of record on
12 review by this court. (Tr. 14-15.) *Ramirez v. Shalala*, 8 F.3d
13 1449, 1452 (9th Cir. 1993); *Gomez v. Chater*, 74 F.3d 967, 971 (9th
14 Cir. 1996). Finally, if there were relevant mental health records
15 that were difficult to obtain prior to the Appeals Council review,
16 Plaintiff could have filed them with his Complaint in this court for
17 a determination of whether good cause existed for their lack of
18 production prior to judicial review. 42 U.S.C. § 405(g); *see also*
19 *Melkonyan v. Sullivan*, 501 U.S. 89, 102 (1991); *Burton v. Heckler*,
20 724 F.2d 1415, 1417 (9th Cir. 1984). From these facts, it can
21 reasonably be inferred that no additional records exist that are
22 relevant to the period between 2007 and the date of the ALJ hearing,
23 and, therefore, remand is not warranted. *Ortez v. Shalala*, 50 F.3d
24 748, 751 (9th Cir. 1995); *Burton*, 724 F.2d at 1417.

25 **E. RFC Determination**

26 Plaintiff claims the ALJ's failure to account for all
27 limitations "calls into question his overall determination" of
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1 Plaintiff's RFC. (ECF No. 14 at 13.) However, as discussed in
2 detail above, ALJ Hertzig's interpretation of the medical evidence
3 in its entirety, as well as Plaintiff's credible testimony, is
4 supported by substantial evidence and free of legal error.

5 Plaintiff appears to argue the ALJ erred when he failed to find
6 non-exertional limitations caused by Plaintiff's limited skills in
7 math, reading, and understanding. (ECF No. 14 at 17.) However, the
8 inclusion of a restriction to unskilled work reflects these
9 limitations. "Unskilled work" involves simple duties that can be
10 learned on the job and require little or no judgment. 20 C.F.R. §§
11 404.1568, 416.968; *Terry v. Sullivan*, 903 F.2d 1273, 1276-77 (9th
12 Cir. 1990). As noted above, Plaintiff reported an adequate ability
13 handle money, pay bills, and perform activities of daily living that
14 require reading, writing and math. Plaintiff offers no evidence
15 that his limited academic skills prevent him from performing
16 unskilled work. Further, he has not demonstrated that depressive
17 disorder symptoms significantly limit his range of work. The record
18 shows Plaintiff reported relief from medication, as long as he
19 complied with prescribed treatment and did not abuse illegal drugs.
20 (See, e.g., Tr. 345.) Impairments that are controlled effectively
21 with medication are not disabling. *Warre v. Commissioner of Soc.*
22 *Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006).

23 A review of the record in its entirety shows the final RFC
24 includes all limitations supported by the record and Plaintiff's
25 credible testimony. Where, as here, the ALJ's findings reflect a
26 rational interpretation of the entire record and are supported by
27 substantial evidence, the court may not substitute its judgment for
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1 that of the Commissioner. 42 U.S.C. § 405(g); *Tackett*, 180 F.3d at
2 1097; *Andrews*, 53 F.3d at 1039 (findings supported by substantial
3 evidence are conclusive); SSR 96-8p.

4 **F. Application of the Grids**

5 Plaintiff argues that due to the presence of non-exertional
6 limitations, the ALJ erred when he did not use a vocational expert
7 in determining his ability to perform other work in the national
8 economy. He contends non-exertional limitations require the
9 testimony of a vocational expert, and the ALJ's reliance on the
10 Medical-Vocational Guidelines, 20 C.F.R. Pt. 404, Subpt. P., App. 2.
11 (Grids) to make his determination was error. (ECF No. 14 at 21.)

12 The Medical-Vocational Guidelines take administrative notice of
13 over 2,500 medium, light, and sedentary unskilled jobs. Where non-
14 exertional limitations would not significantly erode an occupational
15 base, application of the Medical-Vocational Guidelines is
16 appropriate. *Desrosiers v. Secretary of Health and Human Serv's*,
17 846 F.2d 573, 577 (9th Cir. 1988) ("non-exertional limitations do not
18 automatically preclude application of the grids"); *Razey v. Heckler*,
19 785 F.2d 1426, 1430 (9th Cir. 1986).

20 In determining whether the Grids apply at step five, the ALJ
21 must find whether non-exertional limitations "significantly" limit
22 the range of work permitted by Plaintiff's exertional limitations.
23 *Desrosiers*, 486 F.2d at 577 (citing *Razey*, 785 F.2d at 1430). If
24 the limitation is slight, use of the Grids is appropriate. *Id.*; see
25 also *Tucker v. Heckler*, 776 F.2d 793, 795-96 (8th Cir.
26 1985)(unnecessary to call vocational expert where ALJ thoroughly
27 considered claimant's non-exertional impairments and explicitly
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1 determined that they did not diminish claimant's exertional
2 capacities).

3 As discussed above, the ALJ carefully considered non-exertional
4 limitations supported by the credible evidence. He properly
5 rejected possible lapses in attention and concentration due to
6 personality issues mentioned by Dr. Gentile. (Tr. 24.) Symptoms
7 from depression and anxiety were found to be controlled effectively
8 with medication. Neither medical evidence nor Plaintiff's self
9 reported activities support the duration of postural limitations
10 noted in early 2008, shortly after Plaintiff's left knee surgery.

11 The ALJ reasonably determined Plaintiff's ability to perform
12 light work was limited only by the mental limitation to unskilled
13 work. (Tr. 25.) The record supports this conclusion and is
14 consistent with Plaintiff's limited education and academic
15 abilities. Because the ability to perform light work includes the
16 full range of sedentary work, the ALJ's finding that the identified
17 non-exertional limitation did not significantly erode Plaintiff's
18 occupational base is a rational determination supported by case law,
19 the Commissioner's ruling, and substantial evidence in the record.
20 *Desrosiers*, 486 F.2d at 577; SSR 83-10 (occupational base
21 established by RFC includes all occupations at lower exertional
22 level). (Tr. 442, 444-45.) The ALJ did not err in applying the
23 Grids at step five. Accordingly,

24 **IT IS ORDERED:**

25 1. Plaintiff's Motion for Summary Judgment (**ECF No. 13**) is
26 **DENIED;**

27 2. Defendant's Motion for Summary Judgment (**ECF No. 20**) is
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1 **GRANTED.**

2 The District Court Executive is directed to file this Order and
3 provide a copy to counsel for Plaintiff and Defendant. Judgment
4 shall be entered for Defendant, and the file shall be **CLOSED**.

5 DATED February 7, 2012.

6 S/ CYNTHIA IMBROGNO
7 UNITED STATES MAGISTRATE JUDGE
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